89- 1424

Supreme Court, U.S.
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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

1989-90 Term

LINDEN CROUCH,

Petitioner,

v.

KEVIN N. McINTYRE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF
THE STATE OF OREGON

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Counsel of Record
For Petitioner

QUESTION PRESENTED FOR REVIEW

Does the Oregon artificial insemination statute which classifies and defines a sperm donor as having "no right, obligation or interest with respect to a child born as a result of the artificial insemination," violate the Due Process Clause of the Fourteenth Amendment if the donor alleges he can establish that he and the mother orally agreed that he should have the rights and responsibilities of fatherhood and in reliance thereon he donated his semen?

LIST OF ALL PARTIES

The names of all parties to the proceeding in the court whose judgment is sought to be reviewed are contained in the caption in this court.

28 USC §2403(b) may be applicable and service has been made upon the Attorney General of the State of Oregon.

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KEVIN N. McINTYRE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF
THE STATE OF OREGON

Petitioner respectfully prays for the writ of certiorari to review the Order of the Supreme Court of the State of Oregon entered November 30, 1989.

OFFICIAL REPORTS OF OPINIONS BELOW

The opinion of the Court of Appeals of the State of oregon is reported in McIntyre v. Crouch, 98 Or. App. 462, 780 P.2d 239 (1989), rev. den. 308 Or. 593, ___ P.2d ___ (1989).

GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The Order Denying Review by the Supreme Court of the State of Oregon was entered on November 30, 1989.

An Order Staying Issuance of Appellate Judgment pending disposition of this petition for writ of certiorari was entered on January 8, 1990.

Jurisdiction to review this order by write of certiorari exists pursuant to 28 USC §2101(c).

CONSTITUTIONAL PROVISION WHICH THIS CASE INVOLVES

Amendment XIV: Sec 1 No State shall make or enforce any law

which shall abridge the privileges or immunities or citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

CONCISE STATEMENT OF THE CASE

Mr. Mc Intyre and Ms. Crouch, at all times relevant, herein, were not married to each other or to anyone else. They were acquainted with each other. On November 24, 1986, Ms. Crouch gave birth to a child conceived as a result of artificial insemination using Mr. McIntyre's semen, which he had donated to her.

Mr. McIntyre filed a filiation petition in the Circuit Court seeking to establish himself as the legal father of the child. He claimed that

he had given his semen to her in reliance on an oral agreement with her that he "would remain active" in the child's life and "participate in all important decisions concerning the child" and that he would have visitation rights with the child. Mr. McIntyre pleaded that he was ready, willing and able to accept full parental responsibilities for the child. Ms. Crouch denied the allegations concerning an agreement and asserted that Mr. McIntyre should have no legal relationship established with the child. Mr. McIntyre has never had contact with the child.

The Oregon artificial insemination statute provides, inter alia, that:

> If the donor of semen used in artificial insemination is not the mother's husband:

(1) Such donor shall have no right, obligation or interest with respect to a child born as a result of the artificial insemination; and

(2) A child born as a result of the artificial insemination shall have no right, obligation or interest with respect to such donor.1

The statute makes no provision for oral (or written) agreements such as that asserted by Mr. McIntyre.

The trial court found the statute to be constitutional, ruled that Mr. McIntyre had no right, obligation or interest with respect to the child, nor she with him, and dismissed his case. On appeal the Court of Appeals ruled

1. The text of the entire artificial insemination action is contained in the Appendix, p. 3-5.

that the literal interpretation of the statute by the trial court was in error becasue the Fourteenth Amendment provided Mr. McIntyre with a liberty interest which would be thwarted by not allowing him a hearing on his allegations. The Oregon Supreme Court denied reivew.

Mr. McIntyre asserted his Fourteenth Amendment claim at all stages of the proceeding. Relying on this Court's ruling in Stanley v. Illinois, 405 U.S. 645, 92 Sup. Ct. 1208 31 L.Ed2d 551, (1972), Mr. McIntyre asserted his due process claim in the trial court. The Oregon Court of Appeals ruled in Mr. McIntyre's favor on this Fourteenth Amendment claim which he adequately preserved in his brief.

ARGUMENT

Nature of the Case

This case is essentially about a man who has donated a bodily fluid, sperm, and now claims that he donated that sperm in reliance on an oral agreement that he would be the father of the child conceived by artificial insemination. It is not about a man who "sired and raised" children as Peter Stanley did. Id., 651. This case is about what classifications and definitions a state may enact concerning sperm donation and any federal constitutional rights which may follow from the act of donating sperm.

The Oregon legislature enacted the artificial insemination statute, ORS 109.070(1), which determined that, if the sperm donor was not the mother's husband, then he had no rights,

obligation or interest in the child so conceived, nor the child in him. The purpose of the act was, inter alia, to establish very clearly who was legally related to whom, and who was not so related. In that regard, this statute is much like ORS 109.070(1) which conclusively establishes paternity of a child born within a marriage.2 Such a presumption is constitutional. Michael H. v. Gerald D., 491 U.S. ___, 109 S.Ct. 2333, 105 L.Ed.2d 91 (1989).

Sometime after the artificial insemination and conception had taken place and before the birth of the child, Mr. McIntyre came forward

2. ORS 109.070(1) states: The child of a wife cohabiting with her husband who was not impotent or steril at the time of the conception of the child, shall be conclusively presumed to be the child of her husband, whether or not the marriage of the husband and wife may be void.

alleging an oral agreement between himself and the mother that he would be the child's father. The mother, Ms. Crouch, denied the existence of the oral agreement. The literal words of the statute prohibited Mr. McIntyre's claim and the trial court so held.

The Oregon Court of Appeals, in a plurality opinion, held that the Due Process Clause of the Fourteenth Amendment would be violated if Mr. McIntyre were not allowed an opportunity to prove his claim. Citing this Court's opinions in Stanley v. Illinois, supra, and Lehr v. Robertson, 463 U.S. 248, 103 S.Ct. 2985, 77 L.Ed.2d 614 (1983), the Oregon Court of Appeals held that Mr. McIntyre had a "biological connection" to the child and that he had "grasped the opportunity to 'participate in the

rearing of his child.'" McIntyre v. Crouch, supra, 471, citing Lehr v. Robertson, at 261, 262, 471.

Petitioner Crouch urges that neither the Due Process Clause nor this Court's opinions in Stanley, Lehr, or other cases require such a result and that the Oregon Court of Appeals has misapplied the Fourteenth Amendment.

This Court's Precedents

This Court found constitutional protection for Peter Stanely's "private interest...in the children he has sired and raised... ." Stanley v. Illinois, supra, 651.

This Court found that Jonathan lehr was entitled to no due process as an unmarried father for an "inchoate relationship with a child whom he has never supported and rarely seen in the two years since her birth." Lehr v.

Robertson, supra, 249-250.

This Court's holdings in cases dealing with similar issues, Quillon v. Walcott, 434 U.S. 246, 98 S.Ct. 549, 54 L.Ed.2d 511 (1978), Caban v. Mohammed, 441 U.S. 380, 99 S.Ct. 1760, 60 L.Ed.2d 297 (1979) and Michael H. v. Gerald D., 491 U.S., ___ 109 S.Ct. 2333, 105 L.Ed.2d 91 (1989),3 have focused on two issues: a biological connection between man and child plus a long, significant relationship of father with the child(ren). However even when both the biological connection and the significant

3. Stanley v. Illinois, supra, Quillon v. Walcott, supra, Caban v. Mohammed, supra, Lehr v. Robertson, supra, and Michael H. v. Gerald D., supra, are the five cases decided by this Court which involve the issue of an unwed father's liberty interest in children under the Due Process Clause. See, Michael H. v. Gerald D., Id., at 118.

relationship existed, a significant, legitimate state law policy can control. See Michael H v. Gerald D., supra. That is because "[i]n the vast majority of cases, state law determines the final outcome." Lehr v. Robertson, supra, 256. In this case, too, the state law, as enacted by the Oregon legislature, should control because a legitimate state interest is involved, and the statutory scheme is consistent with the Fourteenth Amendment.

It should be noted that by the time of the Michael H. opinion, all members of this Court had come to agree that a "mere biological relationship" is sufficient in itself to establish a protected interest under the Fourteenth Amendment. Compare the dissent of Justice White, joined by Justices Marshall and Blackman in Lehr stating

that "the biological connection is itself a relationship that creates a protected interest," Lehr v. Robertson, supra, 272, with the dissenting statements by Justices Brennan, Marshall, Blackman and White in Michael H. that a "mere biological connection" does not establish a protected interest. Michael H. v. Gerald D. supra, at 118-119, and 130.

In the instant case, Mr. McIntyre claims no more than a biological connection to the child. He donated sperm for the artificial insemination. His claim is based upon an alleged agreement which the mother denies. he has never lived with the mother, he has never lived with the child, he has never supported the child, he has never visited the child. He is not listed on

the birth certificate. The record is clear that he has no more interest in this child than a "mere bilogical connection." The Court of Appeals' Fourteenth Amendment analysis was inconsistent with the analyses in Lehr and Michael H. and is in error.

Even If a Liberty Interest Exists, Oregon Law Provides Due Process

The Court of Appeals erred in its holding that Oregon law does not provide due process if Mr. McIntyre proves the existence of the alleged "agreement."

Even if a liberty interest deserving protection under the Due Process Clause exists, constitutional protection is afforded by granting Mr. McIntyre and his "agreement" a hearing

under ORS 109.119. 4. See generally, Justice Steven concurring opinion in Michael H. v. Gerald D., supra, 112-114.

4. ORS 109.119 provides: Any person...who has establihsed emotional ties creating a child-parent relationship with a child may petition or file a motion for intervention with the court having jurisdiction over the custody, placement, guardianship or hardship of that child, or if no such proceedings are pending, may petition the court for the county in which the minor child resides for an order providing for custody or placement of the child or visitation rights or other generally recognized rights of a parent or person in loco parentis. If the court determines that custody, guardianship, right of visitation, or other generally recognized right of a parent or person in loco parentis, is appropriate in the case, the court shall grant such custody, guardianship, right of visitation or other right to the person having the child-parent ralationship, if to do so is in the past interest of the child.

It would be hard to imagine a statute which more broadly met the due process requirements of Stanley v. Illinois, supra, than ORS 109.119.

It is, therefore, unnecessary to declare the artificial insemination statute unconstitutional in this case in order to satisfy Fourteenth Amendment requirements. If Mr. McIntyre's alleged "agreement" and his "biological connection" with the child constitute a liberty interest, then the process which is due exists under ORS 109.119.

Mr. McIntyre's claim, at the most and if proven, is that he has lost a quantity of sperm because he was tricked by Ms. Crouch. This was conduct between private parties; the government was not involved. A liberty interest under the Due Process Clause does not exist.

The Oregon Court of Appeals ruling of unconstitutionality should be reversed.

REASONS FOR ALLOWANCE OF THE WRIT

The Oregon Court of Appeals has wrongly decided an important public policy issue, misinterpreting the Due Process Clause. The decision of the Oregon Court of Appeals is in conflict with applicable decisions of this Court.

At least twenty-eight5 states have enacted laws dealing with artificial insemination. At least 20,000 children are born each year in

5. Alabama, Alaska, Arkansas, California, Colorado, Connecticut, Florida, Georgia, Illinois, Kansas, Louisiana, Maryland, Michigan, Minnesota, Misissippi, Montana, Nevada, New Jersey, New York, North Carolina, Oklahoma, Oregon, Tennessee, Texas, Virginia, Washington, Wisconsin, and Wyoming.

See, Artificial Insemination: Donor Rights In Situations Involving Unmarried Recipients, 26 Journal of Family Law 793, 795 (1987-88).

the United States by artificial insemination. The primary purpose of artificial insemination laws is to establish the legal status of the child born as a result thereof. See, Legal Aspects of Artificial Insemination, 18 Journal of Family Law 331 (1979-80). Rules governing the legal status of children including "[r]ules governing the inheritance of property, adoption, and child custody are generally specified in statutory enactments that vary from State to State." Lehr v. Robertson, supra, 256. Likewise, rules governing relationships after artificial insemination should be governed by state law.

In making its analysis of the Oregon statute, the Oregon Court of Appeals made a ruling concerning the Due Process Clause which is

inconsistent with applicable decisions of this Court. As is pointed out above, this Court has rarely found a classification concerning the parent-child relationship to be unconstitutional. Never has this Court ruled that a "mere biological relationship" is sufficient to establish a liberty interest. Today, all members of this Court agree that a "mere biological relationship" is insufficient, in itself, to establish a protected interest under the Fourteenth Amendment. See generally, Michael H. v. Gerald D. supra, and specifically at page 118-119 and 130.

The Oregon Court of Appeals' opinion calls into question the legal relationships among donors, fathers and children conceived by artificial

insemination in Oregon, and if followed elsewhere, concerning the 20,000+ children born in the United States as a result of artificial inseminaton each year. As Judge Richardson of the Oregon Court of Appeals pointed out in his dissent, "I cannot discern why the lead opinion's due process reasoning would not extend to an anonymous donor who has second thoughts, obtains the mother's identity and institutes a filiation proceeding... . There is no difference for purposes of due process analysis, between petitioner and the other artificial insemination donors whom the lead opinion seeks to distinguish, except that petitioner is the only donor of semen who has sought to be recognized as a father so far. ...The holding of the lead opinion turns the statutory scheme into a house

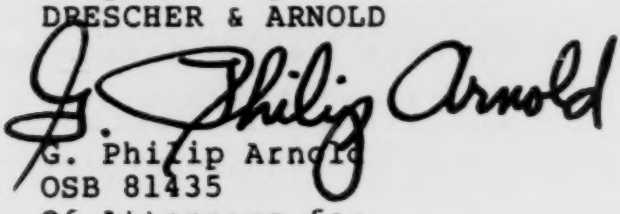
of sand." McIntyre v. Crouch, supra, 475-477, (emphasis in original). In Judge Richardson's view, and in the view of the petitioner, all any sperm donor has to do under the teachings of the opinion of the Oregon Court of Appeals is to have second thoughts, institute a filiation proceeding, and claim that he wants to be involved in the responsibilities of fatherhood. Id. Such a result undercuts the statute's very purpose, as defined by the opinion of the Oregon Court of Appeals, which is "to resolve potential disputes about parental rights and responsibilities." Id., 468.

CONCLUSION

The Oregon Court of Appeals decided an important question in a manner inconsistent with the holdings of this

Court. Oregon, and the other states which are addressing this issue, should be able to determine the relationships of the participants in artificial insemination, as a matter of state law.

Respectfully Submitted,
DRESCHER & ARNOLD



G. Philip Arnold
OSB 81435
Of Attorneys for
Petitioner

IN THE SUPREME COURT
OF THE STATE OF OREGON

MCINTYRE, KEVIN N Respondent	)	ORDER DENYING REVIEW
v.	)	
CROUCH, LINDEN, Petitioner	)	CA A44574 SC S36587

The Court has considered the petition for review and ORDERS that it be denied.

DATE: NOVEMBER 30, 1989.

/s/EDWIN J. PETERSON
EDWIN J. PETERSON
CHIEF JUSTICE

COPIES TO:

FONTANA, RONALD A — Attorney for: Respondent

ARNOLD, G. PHILIP — Attorney for: Petitioner

IN THE COURT OF APPEALS
OF THE STATE OF OREGON

KEVIN N. McINTYRE,	)	Jackson County Circuit Court
Petitioner-Appellant	)	No. 2109-F
v.	)	CA A44574
LINDEN CROUCH,	)	ORDER STAYING ISSUANCE OF
Respondent-Respondent.	)	APPELLATE JUDGMENT

Appellant has moves for a stay of issuance of the appellate judgment pending disposition of his petition for writ of certiorari to the United States Supreme Court. The motion is allowed.

/s/George M. Joseph
Chief Judge

Jan 8 1990
Date

c: Ronald A. Fontana
G. Philip Arnold

Replies should be directed to the State Court Administrator, Records, Section, Supreme Court Building, 1163 State St., Salem, OR 97310

1 Or Laws 1977, ch 686, provides:

"SECTION 1. As used in this Act, 'artificial insemination' means introduction of semen into a woman's vagina, cervical canal or uterus through the use of instruments or other artificial means.

"SECTION 2. Only physicians licensed under chapter 677 and persons under their supervision may select artificial insemination donors and perform artificial insemination.

"SECTION 3. (1) Artificial insemination shall not be performed upon a woman without her prior written request and consent and, if she is married, the prior written request and consent of her husband.

"(2) Whenever a child is born who may have been conceived by the use of semen of a donor who is not the woman's husband, a copy of the request and consent required under subsection (1) of this section shall be filed by the physician who performs the artificial insemination with the State Registrar of Vital Statistics. The state registrar shall prescribe the form of reporting.

"(3) The information filed under subsection (2) of this section shall be sealed by the state registrar and may be opened only upon an order of a court competent jurisdiction.

"(4) If the physician who performs

the artificial insemination does not deliver the child conceived as a result of the use of semen of a donor who is not the woman's husband, it is the duty of the woman and the husband who consented pursuant to subsection (1) of this section to give that physician notice of the child's birth. The physician who performs the artificial insemination shall be relieved of all liability for noncompliance with subsection (2) of this section if the noncompliance results from lack of notice of the physician about the birth.

"SECTION 4. No semen shall be donated for use in artificial insemination by any person who:

"(1) Has any disease or defect known by him to be transmissible by genes; or

"(2) Knows or has reason to know he has a venereal disease.

"SECTION 5. If the donor of semen used in artificial insemination is not the mother's husband:

(1) Such donor shall have no right, obligation or interest with respect to a child born as a result of the artificial insemination; and

(2) A child born as a result of the artificial insemination shall have no right, obligation or interest with respect to such donor.

"SECTION 6. The relationship, rights and obligations between a child born as a result of artificial insemination and the mother's husband shall be the same to all legal intents and purposes as if the child had been naturally and legitimately conceived by the mother and the mother's husband if the husband consented to the performance of artificial insemination.

"SECTION 7. Except as may be otherwise provided by a judicial decree entered in any action filed before the effective date of this Act, the provisions of this Act shall apply to all persons conceived as a result of artificial insemination.

"SECTION 8. A person who violates the provisions of sections 2 to 4 of this Act commits a Class C misdemeanor."

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

McINTYRE,
Appellant,

v.

CROUCH,
Respondent

(2109-F; CA A44574)

Appeal from Circuit Court, Jackson County.

Mitchell Karaman, Judge.

Argued and submitted May 18, 1988.

Ronald A. Fontana, Portland, argued the cause for appellant; with him on the briefs was Steenson, Fontana, Schumann & Ellis, Portland.

G. Philip Arnold, Ashland, argued the cause for respondent; with him on the brief was Drescher & Arnold, Ashland.

Before Richardson, Presiding Judge, and Newman and Deits, Judges.

NEWMAN, J.

Reversed and remanded.

Deits, J., specially concurring

Richardson, P.J., dissenting.

NEWMAN, J.

In this filiation action, ORS 109.124 et seq, petitioner appeals a summary judgment that declared that he has no parental rights as to the child that respondent, an unmarried woman, conceived by artificial insemination with petitioner's semen. Respondent contested petitioner's action to be declared the child's father. The parties filed cross-motions for summary judgment. Petitioner assigns as errors that the court granted respondent's motion and denied his motion. The court held that there was no genuine issue of material fact, that ORS 109.239 bars petitioner from obtaining parental rights and that, as applied to him, it is constitutional. We reverse.

To qualify under the filiation statute as an initiating party and be

declared a father, see ORS 109.125(e) and ORS 109.155, petitioner must show that ORS 109.239 does not bar him. It is undisputed that, with respondent's knowledge, petitioner voluntarily gave his semen to her and that she inseminated herself without the supervision of a physician. The child was conceived as a result of the insemination. Petitioner and respondent were acquainted, but were not married to each other or to anyone else. Petitioner pleaded, and respondent denied in her answer, that he gave his semen to her in reliance on an agreement with her that he "would remain active" in the child's life and "participate in all important decisions concerning the child" and that he would have visitation rights one weekend each

month and for six consecutive weeks each summer. Petitioner also pleaded, and respondent also denied in her answer, that he is ready, willing and able to accept the same responsibility for the support, education, maintenance and care of the child and for pregnancy related expenses as he would have if the child were born in lawful wedlock.

Five days before the hearing on the motions for summary judgment, petitioner served affidavits. They described the agreement and asserted that petitioner and respondent made it before he donated his semen, that he gave his semen in reliance on it and that he is ready, willing and able to undertake the responsibilities for the support, education, maintenance and care of the child as if it were born to him in marriage or as a result of

sexual intercourse between him and respondent. Respondent did not file counteraffidavits. At the hearing, the court orally allowed respondent's motion and denied petitioner's.

On April 22, petitioner moved for reconsideration. In support of his motion, his counsel submitted an affidavit:

"I appeared before the Court on April 13, 1987 at 1:30 P.M., the hour set for hearing on the cross-motions for Summary Judgment. The [court] announced that [it] had not received petitioner's response to the respondent's Motion for Summary Judgment, the Affidavits filed in support of petitioner's response, or petitioner's Memorandum of law. I advised the Court that said documents had been placed in the United States mail at Portland, Oregon on April 8, 1987. Respondent's counsel***stated that his copies of the documents had been received at his office and he reviewed them the morning of April 13, 1987. At the time of the hearing, I provided the Court additional copies of petitioner's Response, Affidavits and Memorandum.***

"Respondent's counsel stated that there was an issue of fact in that his clients would dispute that there was an agreement between petitioner and respondent as was alleged in the Petition for Filiation and in the Affidavits filed by petitioner. I stated that if respondent disputed the facts alleged by petitioner, then petitioner demanded a jury trial to determine the facts."

On May 18, the court heard arguments on the motion to reconsider. The court entered a judgment on May 27 and an amended judgment on June 8 that each granted respondent's motion for summary judgment and denied petitioner's. Each judgment recited that the court had considered the "affidavits filed in support of the motions." Petitioner appeals from the amended judgment.

The statute respecting artificial insemination, Oregon Laws 1977, chapter 686 (the act), is codified at ORS 109.239 to ORS 109.247, ORS 677.355 to ORS 677.370 and ORS 677.990(1) and

(3).1 ORS 109.239 (section 5 of the act) provides:

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1 Or Laws 1977, ch 686, provides:

"SECTION 1. As used in this Act, 'artificial insemination' means introduction of semen into a woman's vagina, cervical canal or uterus through the use of instruments or other artificial means.

"SECTION 2. Only physicians licensed under chapter 677 and persons under their supervision may select artificial insemination donors and perform artificial insemination.

"SECTION 3. (1) Artificial insemination shall not be performed upon a woman without her prior written request and consent and, if she is married, the prior written request and consent of her husband.

"(2) Whenever a child is born who may have been conceived by the use of semen of a donor who is not the woman's husband, a copy of the request and consent required under subsection (1) of this section shall be filed by the physician who performs the artificial insemination with the State Registrar of Vital Statistics. The state registrar shall prescribe the form of reporting.

"If the donor of semen used in

"(3) The information filed under subsection (2) of this section shall be sealed by the state registrar and may be opened only upon an order of a court competent jurisdiction.

"(4) If the physician who performs the artificial insemination does not deliver the child conceived as a result of the use of semen of a donor who is not the woman's husband, it is the duty of the woman and the husband who consented pursuant to subsection (1) of this section to give that physician notice of the child's birth. The physician who performs the artificial insemination shall be relieved of all liability for noncompliance with subsection (2) of this section if the noncompliance results from lack of notice of the physician about the birth.

"SECTION 4. No semen shall be donated for use in artificial insemination by any person who:

"(1) Has any disease or defect known by him to be transmissible by genes; or

"(2) Knows or has reason to know he has a venereal disease.

"SECTION 5. If the donor of semen used in artificial insemination is not the mother's husband:

artificial insemination is not the

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(1) Such donor shall have no right, obligation or interest with respect to a child born as a result of the artificial insemination; and

(2) A child born as a result of the artificial insemination shall have no right, obligation or interest with respect to such donor.

"SECTION 6. The relationship, rights and obligations between a child born as a result of artificial insemination and the mother's husband shall be the same to all legal intents and purposes as if the child had been naturally and legitimately conceived by the mother and the mother's husband if the husband consented to the performance of artificial insemination.

"SECTION 7. Except as may be otherwise provided by a judicial decree entered in any action filed before the effective date of this Act, the provisions of this Act shall apply to all persons conceived as a result of artificial insemination.

"SECTION 8. A person who violates the provisions of sections 2 to 4 of this Act commits a Class C misdemeanor."

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mother's husband:

"(1) Such donor shall have no right, obligation or interest with respect to a child born as a result of the artificial insemination; and

"(2) A child born as a result of the artificial insemination shall have no right, obligation or interest with respect to the donor."

Petitioner argues that the legislature did not intend that ORS 109.239 apply to bar him, because (1) the artificial insemination occurred without the intercession of a physician, (2) he is not an anonymous donor, (3) respondent is unmarried, (4) he gave respondent his semen in reliance on an agreement that they made that he would have parent rights and (5) he wishes to undertake the responsibilities of fatherhood. He also argues that if, as applied to him, ORS 109.239 deprives him of parental rights, it violates Article I, sections 10 and 20, of the Oregon Constitution, the Due Process

and Equal Protection Clauses of the Fourteenth Amendment and the federal constitutional right of privacy.

Respondent responds that she did not make the agreement with him but that,in any event, it is immaterial whether she did because, even if she made the agreement, he has no parental rights under the act. She also asserts that the act, as applied to petitioner, is constitutional.

We hold that ORS 109.239 applies to petitioner. Although the act does not define "donor," it is clear that a donor is a man who gives his semen for the purpose of artificial insemination. Petitioner is a donor, even though a physician or a person under his supervision did not perform the insemination, respondent knew that

petitioner was the source of the semen when she used it and she was unmarried. Although ORS 677.360 (section 2 of the act) states that "[o]nly licensed physicians and persons under their supervision may select artificial insemination donors and perform artificial insemination," ORS 677.355 (section 1 of the act) defines "artificial insemination" without reference to whether a physician performs the insemination. Moreover, ORS 677.990(3) (section 8 of the act) only means that, if a woman artificially inseminates herself without a physician's supervision, she commits a class C misdemeanor. Furthermore, a man who give his semen for the purpose of artificial insemination is a donor, even though the woman who uses it is unmarried.

See ORS 677.365(1) (section 3(1) of the act).

We cannot say that the legislature intended that a man who gives his semen for the purpose of artificial insemination is not a donor simply because he is not anonymous--that is, he is known to the woman as the semen producer. The legitimate purposes of the act are: (1) to allow married couples to have children, even though the husband is infertile, impotent or ill; (2) to allow an unmarried woman to conceive and bear a child without sexual intercourse; (3) to resolve potential disputes about parental rights and responsibilities: that is, (a) the mother's husband, if he consents, is father of the child and (b) an unmarried mother is freed of any

claims by the donor of parental rights; (4) to encourage men to donate semen by protecting them against any claims by the mother or the child; and (5) to legitimate the child and give it rights against the mother's husband, if he consents to the insemination. To achieve those purposes, the act bars a donor from the rights and responsibilities of fatherhood. It would be inconsistent with the purposes of the act if a donor were not barred simply because he was known to the mother at the time of conception as the semen producer. Additionally, the act, by its terms, does not limit the application of ORS 109.239 to anonymous donors.

Furthermore, ORS 109.239 bars petitioner from rights and responsibilities of fatherhood, even if

respondent had agreed with him before he gave her his semen that he would have these rights and responsibilities and he gave his semen in reliance on that agreement. Again, ORS 109.239 contains no qualifying language.2 It is unambiguous. By its terms, it bars petitioner. We cannot rewrite the act.

Petitioner asserts, however, that ORS 109.230 makes the agreement enforceable:

"Any contract between the mother and father of a child born out of wedlock is a legal contract, and the admission by the father of his fatherhood of the child is sufficient consideration to support the contract."

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2. Compare RCW 26.26.050(2):

"The donor of semen provided to a licensed physician for use in artificial insemination of a woman other than the donor's wife is treated in law as if he were not the natural father of a child thereby conceived unless the donor and the woman agree in writing that said donor shall be the father. The agreement must be in writing and signed by the donor and the woman."

The legislature, however, enacted ORS 109.230 before it enacted the act. Petitioner, as a donor under ORS 109.239, is not a "father" under ORS 109.230.

Accordingly, we must determine if ORS 109.239, as applied to petitioner, is constitutional. If it is, any dispute over existence or nature of the agreement would not be material. We turn first to the state constitutional issues. State v. Kennedy, 295 Or 260, 666 P2d 1316 (1983). Respondent asserts that ORS 109.239, as applied to him, violates Article I, section 20, of the Oregon Constitution.3 It is not

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3. Article I, section 20, provides:
"No law shall be passed granting to any citizen or class of citizens privileges, or immunities, which, upon the same terms, shall not equally belong to all citizens."

disputed that, if petitioner and respondent had mutually agreed that he should have the rights and responsibilities of fatherhood and, in reliance thereon, he gave his semen by sexual intercourse, the legislature could not declare that he has no claim to be the father. Whether a male impregnates a woman by artificial insemination or by sexual intercourse, however, is not a distinction based on an immutable characteristic. A classification between males that bars some and not others from claiming to be a father, depending on how the male's semen is placed in an unmarried woman, will not violate Article I, section 20, if the classification has a rational foundation in the light of the statute's purpose. See Van Daam v. Hegstrom, 88 Or App 40, 43, 744 P2d 269

(1987). Even if petitioner and respondent agreed that he have the rights and responsibilities of fatherhood and, in reliance thereon, he had donated his semen, there is a rational connection between ORS 109.239, if applied to bar his fatherhood, and the purposes of the act.

Petitioner also argues that ORS 109.239 violates Article I, section 20, because it gives respondent, an unmarried female, parental rights that it denies to petitioner, an unmarried male. He emphasizes that an unmarried male who donates semen does not have the rights of a father, but an unmarried woman who receives the sperm and conceives and bears the child is not deprived of the rights of a mother.

A statute that gives a privilege to women while denying it to men is inherently suspect and subject to strict scrutiny, unless the classification (1) is based on specific biological differences between men and women and (2) is rationally related to the purposes o the statute. See Hewitt v. SAIF, 294 Or 33, 46, 653 P2d 970 (1982). Here, the classification of unmarried males and unmarried females is based on biological differences between men and women. Only a male could contribute the sperm to accomplish conception; only a female could conceive and bear the child. Furthermore, the classification is rationally related to the purposes of the act and facilitates the use of artificial insemination by an unmarried woman.

ORS 109.239, as applied to petitioner, also does not violate Article I, section 10. The statute does not deny to him a remedy for an injury to his person other than, as noted below, to deny to him due process. Article I, section 10, is not a guarantee of due process. See Cole v. Dept. of Revenue, 294 Or 188, 191, 655 P2d 171 (1982); Maddox v. Clac. Co. Sch. Dist. No. 25, 293 Or 27, 34 n 7, 643 P2d 1253 (1982); see also Hilton v. MVD, 93 Or App 388, 393, 762 P2d 1030 (1988), aff'd on different grounds 308 Or 150 (1989); Linde, "Without Due Process," 49 Or L Rev 125, 136-138 (1970).

We turn to petitioner's federal constitutional claims. We hold that ORS 109.239, as applied to petitioner,

will violate the Due Process Clause of the Fourteenth Amendment if he can establish that he and respondent agreed that he should have the rights and responsibilities of fatherhood and in reliance thereon he donated his semen. In Lehr v. Robertson, 463 US 248, 103 S Ct 2985, 77 L Ed 2d 164 (1983), the court discussed the significance to the man's rights and responsibilities of fatherhood of the biological connection between the man and the child. There, the issue was whether the unmarried father, whose child was conceived by sexual intercourse, had to have notice and an opportunity to be heard before the child could be adopted by others. Under New York law, an unmarried father would not receive notice and an opportunity to be heard in the adoption proceeding, unless he had asserted the

rights and responsibilities of a father in a manner that New York law prescribed. The court stated:

"When an unwed father demonstrates a full commitment to the responsibilities of parenthood by coming forward to participate in the rearing of his child,***his interest in personal contact with his child acquires substantial protection under the Due Process Clause. *** But the mere existence of a biological link does not merit equivalent constitutional protection.***

"The significance of the biological connection is that it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring. If he grasps that opportunity and accepts some measure of responsibility for the child's future, he may enjoy the blessings of the parent-child relationship and make uniquely valuable contributions to the child's development. If he fails to do so, the Federal Constitution will not automatically compel a State to listen to his opinion of where the child's best interest lie." 463 US at 261.

In Lehr, the biological father had not complied with the New York statute, and the court held that he was not

entitled to notice and hearing. Lehr indicates, however, that, under the Due Process Clause, a state may not place an absolute bar to a biological father's efforts to assert the rights and responsibilities of fatherhocd. Here, petitioner has the biological connection with respondent's child, although it is the result of artificial insemination, not sexual intercourse. He has complied with the procedural requirements to bring this filiation action. If he can prove the facts that he asserts in his affidavits, he clearly has "grasped the opportunity" to "participate in the rearing of his child." Lehr v. Robertson, supra, 463 US at 261, 262; see also Stanley v. Illinois, 405 US 645, 92 S Ct 1208, L

Ed2d 551 (1972);4 compare Michael 31

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4. In Stanley, the Supreme Court invalidated a statute that allowed the state to terminate, without a hearing, the biological father's custody of his illegitimate children upon the death of their mother. In holding that the statute violated the father's rights to due process under the Fourteenth Amendment, the Court stated:

"The private interest here, that of a man in the children he has sired and raised, undeniably warrants deference and, absent a powerful countervailing interest, protection. It is plain that the interest of a parent in the companionship, care, custody, and management of his or her children comes to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements.***

"The Court has frequently emphasized the importance of the family. The rights to conceive and to raise one's children have been deemed essential, *** basic civil rights of man,***and rights far more precious than property rights.***It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." 405 UC at 651 (Citations omitted).

Michael H. v. Gerald D., 491 US ___, 109 S Ct ___, 105 L Ed2d 91 (1989). Yet ORS 109.239 places an absolute bar to his assertion of the rights and responsibilities of fatherhood.5

The Due Process Clause can afford no different protection to petitioner as the biological father because the child was conceived by artificial insemination rather than by sexual

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5. As indicated above, ORS 109.239 bars a donor, even though the unmarried woman knew that he was the donor when he gave her his semen. There is no constitutional requirement that, because the donor is known to the unmarried woman when he gives his semen, he must have a claim to be a father. That he is known does not mean that he has asserted any rights or assumed any responsibilities of fatherhood other than the donation itself. Simply by donating semen and making his identity known to the unmarried woman, he does not, in the language of Lehr "grasp the opportunity to accept some measure of responsibility for the child's future."

intercourse, providing that he can prove the facts that he asserts in his affidavits. The constitutionality of ORS 109.239, as applied to petitioner, turns on whether he can establish those facts. There are, therefore, genuine issues of material facts respecting the existence and nature of the agreement. The court erred when it granted summary judgment to respondent.6

The court did not err, however, when it denied summary judgment to petitioner. Although petitioner's affidavits describe the agreement and respondent did not file counter-affidavits, she did not have an

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6. Because of our disposition of the case, we do not consider petitioner's claim that ORS 109.239 denies him equal protection of the laws or a right of privacy under the United States Constitution.

adequate opportunity to respond before the court hearing on April 13, 1987. See ORCP 47C. When the court considered the motions on May 18, petitioner's attorney had timely filed an affidavit that stated that respondent disputed that there was an agreement as alleged in the petition and in petitioner's affidavits.

Reversed and remanded.

DEITS, J., specially concurring.

I agree with the lead opinion's conclusion that ORS 109.239, if it applies to this case, violates father's right to due process. However, I do not believe that we should even reach that issue, because the father in this case is not a "donor" for the purposes of ORS 109.239.

Judge Newman concludes that the term "donor," as used in ORS 109.239,

is unambiguous and clearly applies to petitioner. I disagree. The term is not defined in the statute. When read in the context of the statutory scheme and its purpose, it becomes clear that the statute was not intended to apply to this unique fact situation. ORS 109.239 was adopted as part of Oregon Laws 1977, chapter 686, an act concerning exclusively with artificial insemination. The act established certain procedures for artificial insemination and required that only a licensed physician could perform the insemination. It also provided that only a physician or a person under his supervision could select the donor, that the woman must request and consent to the insemination and that copies of the consent must be filed with the

Bureau of Vital Statistics.

The legislative history of the act clearly reveals that the legislature did not intend to address the circumstances presented in this case. Rather, the act was designed: (1) to establish a legal obligation for a husband to support a child born to his wife by means of an artificial insemination to which he has consented and (2) to relieve the sperm donor and the child of any rights or obligations toward one another when neither the donor nor the mother intended that the

donor be the legal father.1

Father's situation here falls somewhere between the situation contemplated by the statute when a mother is inseminated with sperm obtained through a sperm bank from an

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1. Although I agree in general with the lead opinion's summary of the purposes of the artificial insemination statute, I do not agree with its broad application of the third purpose "to resolve potential disputes about parental rights and responsibilities." 98 Or App 462 at 468. Although disputes over parental rights and responsibilities may be particularly cumbersome when an anonymous donor is involved, the same problems do not arise in a case such as this, where there is no question as to the identity of the donor or, for purposes of summary judgment at least, the parties' intent. Ironically, the only cumbersome dispute in this case arises out of the statute itself. Were it not for the statute, there would be no question but that father has rights in and responsibilities for his biological child. I fail to see how a broad application of the statute to this case furthers any of the purposes that it cites.

anonymous donor, which clearly is governed by ORS 109.239, and the situation when a mother becomes pregnant through intercourse with a man who is clearly not her husband, which clearly is not governed by ORS 109.239. In my view, the father in this case is much more closely aligned with the latter. Although there are significant differences between the situation here and one involving an anonymous donor, the only difference between this case and one involving an "ordinary," out-of-wedlock pregnancy is that mother and father here did not engage in intercourse. In my view, that should not be the test of fatherhood, and I do not believe the statute compels us to conclude that it is.

I would not construe the term "donor" to apply to father in this

case. In my view, a donor, be it of property or of biological matter, is one who makes an unconditional, no-strings-attached "donation."2 How can it be said that one "donates" a thing when he reserves the right to visit its product one weekend each month, six weeks each summer, every other birthday, alternate holidays and every Father's Day? How is one a "donor" when he agrees to participate in the support, maintenance and upbringing of the product of the donated thing? If,

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2. See, e.g., Black's Law Dictionary 437, 439 (5th ed 1979):

"Donatio. ***The act by which the owner of a thing voluntarily transfers the title and possession of the same from himself to another person, without any consideration.

"Donor.***One who makes a gift."

on remand, father establishes that an agreement exists between mother and him, I would hold it enforceable under ORS 109.230.3

RICHARDSON, P.J., dissenting.

I agree with the lead opinion that ORS 109.239 applies to petitioner by its terms and precludes him from obtaining parental rights in the child. I do not agree that that application of the statute is unconstitutional. I therefore respectfully dissent.

I have little to add to the lead opinion's able discussion of the

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3. ORS 109.230 provides:

"Any contract between the mother and father of a child born out of wedlock is a legal contract, and the admission by the father of his fatherhood of the child is sufficient consideration to support the contract."

applicability of the statute. I agree with the observation in the concurring opinion that the legislature "did not intend to address the circumstances presented in this case" 98 Or App at 473 if, by that, Judge Deits means that the legislature probably did not think of this situation when it considered and adopted ORS 109.239. However, I do not think that that matters. The language of the statute is reasonably clear, and its general objective of denying parental rights to males whose semen is used for artificial insemination is very clear. ORS 109.239 applies when "the donor of semen used in artificial insemination is not the mother's husband." Thus, even the husband of a recipient is a "donor" under the statute, and husbands of recipients are

the only donors who are not subject to the statutory exclusion of rights and obligations.

The quoted language also shows that the legislature was aware that a male who is acquainted with a woman, as well as a stranger, can be the source of the semen that is used for artificial insemination. The only "known" males to whom it made the statutory exclusions inapplicable are husbands who donate semen to their wives. Whether that was done by design or oversight, it was done unambiguously. It may be that, if the legislature had though of a situation like this, where a donor who is not the mother's husband has a consensual parental arrangement with her, it might have considered a second exception to the operation of

the statute. However, it is not for this court to create that exception on the supposition that the legislature would or should have done so or that it did not mean what its statute clearly says.

I do not agree with the lead opinion and the concurrence that the application of ORS 109.239 to petitioner is a denial of due process. Lehr v. Robertson, 463 US 248, 103 S Ct 2985, 77 L Ed2d 614 (1983), and Stanley v. Illinois, 405 US 645, 92 S Ct 1208, 31 L Ed2d 551 (1972), on which the lead opinion and petitioner rely, involved the rights of unwed fathers with respect to children who were conceived through sexual intercourse. The lead opinion postulates that petitioner's constitutionally protected interest is of the same magnitude as

that of the fathers in those cases. Even if I shared that assumption, I would not agree with the lead opinion's resolution of the due process issue. The state has a legitimate and compelling interest in the regulation of artificial insemination and its social and economic incidents. The state's interest in this subject and in this substantive regulation is far greater than the governmental interest in the procedure that was held unconstitutional in Stanley or the one that was upheld in Lehr.

The lead and concurring opinions seem to treat petitioner's situation as more analogous to that of a father who has impregnated a mother by sexual intercourse than to that of the typical artificial insemination donor. They

emphasize the consensual decision to have a child that likens petitioner to an ordinary father and the "anonymous" nature of the typical donor that differentiates petitioner. My colleagues appear oblivious of the fact that the lines they draw are easily crossed. I cannot discern why the lead opinion's due process reasoning would not extend to an anonymous donor who has second thoughts, obtains the mother's identity and institutes a filiation proceeding or why that donor would any the less than petitioner be engaged in "efforts to assert the rights and responsibilities of fatherhood." 98 Or App at 471.

The lead opinion also seeks to differentiate petitioner from other donors who might be familiar with the mother of an artificially inseminated

child. It states:

"There is no constitutional requirement that, because the donor is known to the unmarried woman when he gives his semen, he must have a claim to be a father. That he is known does not mean that he has asserted any rights or assumed any responsibilities of fatherhood other than the donation itself. Simply by donating semen and making his identity know to the unmarried woman, he does not, in the language of Lehr 'grasp the opportunity to accept some measure of responsibility for the child's future.'" 98 Or App at 471, n 5.

The lead opinion attempts to put petitioner in a one-man compartment and does not recognize that he cannot be forced into the compartment without bursting it. The relevant language in Lehr v. Robertson, supra, does not turn on the mother's awareness of the father's identity, but on the father's subsequent attempt to assert and accept parenthood. There is no difference, for purposes of due process analysis,

between petitioner and the other artificial insemination donors whom the lead opinion seeks to distinguish, except that petitioner is the only donor of semen who has sought to be recognized as a father so far.

The foregoing discussion is not designed to demonstrate that other donors enjoy the due process entitlement that my colleagues would confer on petitioner, but to help explain why petitioner has no such entitlement. Unlike the procedures considered in Stanley v. Illinois, supra, and Lehr v. Robertson, supra, ORS 109.239 is a substantive regulation in which the governmental interest is great. Its effect is not limited to parental rights and obligations. As the lead opinion points out, the resolution of "potential disputes about

parental rights and responsibilities," 98 Or App at 468, is integral to the legislative scheme of regulating artificial insemination. The statutes contemplate that the ultimate relationship, or absence of one, must be defined before the child is conceived in order to facilitate informed decisions about whether to donate and to conceive. The statutory policy assures the stability of all parties' lives in the aftermath of the decisions. The holding of the lead opinion turns the statutory scheme into a house of sand.

I would reject petitioner's due process argument. I agree with the lead opinion that his other constitutional arguments fail, and I would affirm the judgment.

I dissent.

Supreme Court, U.S.
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No. 89-1424

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1989

LINDEN CROUCH,

Petitioner,

v.

KEVIN N. McINTYRE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF
THE STATE OF OREGON

BRIEF IN OPPOSITION

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BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Is the state court's judgment final within the meaning of 28 U.S.C. section 1257(3) (1982)?

2. Does the Oregon artificial insemination statute which denies a biological father any parental rights to his child produced by artificial insemination violate the Due Process Clause of the Fourteenth Amendment where the unmarried mother had agreed that he was to have parental rights and the father's sperm was given to her in reliance on that agreement?

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BRIEF FOR RESPONDENT IN OPPOSITION

The Respondent Kevin McIntyre respectfully requests that this Court deny the Petition for Writ of Certiorari, seeking review of the Oregon Court of Appeals' opinion in this case. That opinion is reported at 98 Or.App. 462, 780 P.2d 239 (1989).[1] Respondent accepts as adequate for review, petitioner's statement of the opinions below and her statement of the constitutional and statutory provisions involved.

JURISDICTION

Although petitioner filed a timely petition for certiorari, this court lacks jurisdiction because the state court's

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[1] The Petitioner has requested that a writ be directed to the Oregon Supreme Court. That Court merely denied discretionary review and did not consider the merits. 308 Or. 593 (1989). Petitioner's request should be for a writ to the Oregon Court of Appeals.

judgment is not final within the meaning of 28 U.S.C. section 1257(3) (1982). This issue is discussed below as a reason for denying the petition for certiorari.

STATEMENT OF THE CASE

This brief will first discuss the procedural posture of the case and then the material facts. The brief will then discuss the reasons why the petition for a writ should be denied.

I. The Procedural Posture of this Case.

This litigation arises out of a Petition to Establish Filiation filed by Respondent Kevin McIntyre in the state trial court. Mr. McIntyre alleged that he is the unmarried father of the infant child Glenellen Susan Arkin born to the unmarried Petitioner Linden Crouch by artificial insemination pursuant to an agreement between them that he was to have certain parental rights to the child, including visitation according to

a specific schedule. Ms. Crouch filed a motion for summary judgment, claiming that Mr. McIntyre had no parental rights as a matter of Oregon law. Mr. McIntyre cross filed for summary judgment, claiming that the Oregon statute, Or.Rev.Stat. 109.239 (1 Or Laws 1977, ch 686), violated his Fourteenth Amendment rights to due process by denying him a hearing to establish that he is the child's father, that he is a fit parent and that the parties had agreed that he would have parental rights. Although Ms. Crouch neither testified nor filed an affidavit to deny the agreement, her attorney orally told the trial court that an agreement was irrelevant and that they would dispute it.

The trial court found that there were no disputed questions of material fact and granted Ms. Crouch's motion for summary judgment, ruling that the Oregon

artificial insemination statute extinguished any right Mr. McIntyre might otherwise have to the child.

The Oregon Court of Appeals reversed. McIntyre v. Crouch, 98 Or. App. 462, 780 P.2 239 (1989). It held, as a matter of procedural law, that there were disputed issues of material facts respecting the existence and nature of the agreement that made summary judgment for either party improper. It further held that if Mr. McIntyre can establish that the parties had "agreed that he should have the rights and responsibilities of fatherhood and in reliance thereon he donated his semen", then the Oregon artificial insemination statute, as applied to Mr. McIntyre, would violate the Due Process Clause of the Fourteenth Amendment. The Court of Appeals remanded the case to the trial

court for a hearing to determine the facts.

If, on remand, the trial court were to find that there was no such agreement or reliance then, presumably, the trial court would declare Mr. McIntyre to have no parental rights.

II. Statement of Material Facts.

Because this litigation arises on Ms. Crouch's motion for summary judgment, the following facts, drawn from the affidavits filed in opposition to the motion, are set out in the light most favorable to Mr. McIntyre. See Seeborg v. General Motors Corporation, 284 Or. 695, 699, 588 P.2d 1110 (1978) (under Oregon procedure, "[t]he record on summary judgment is viewed in the light most favorable to the party opposing the motion").

Kevin McIntyre is a resident of the State of California. He has been friends

with the Linden Crouch for over thirteen years. Mr. McIntyre had been attempting since 1980 to have a child through adoption. Since 1983 he has attempted to have a child through a surrogate mother or to parent a child through artificial insemination where he would have continuing parental rights. Ms. Crouch previously attempted to find for Mr. McIntyre, a woman who would be willing to serve as a surrogate mother to produce a child with and for Mr. McIntyre. At one time, in about 1983, Ms. Crouch herself offered to serve as a surrogate mother to have a child by Mr. McIntyre and to give up any maternal rights to the child. Mr. McIntyre declined the offer out of concern that Ms. Crouch was not then mature enough to make such a decision.

In November 1985, when Mr. McIntyre was at the home of the Ms. Crouch's parents for Thanksgiving, Ms. Crouch

asked whether Mr. McIntyre would be willing to father her child. Mr. McIntyre made it clear that he had no interest in serving as a simple donor of sperm without continuing full parental rights. Ms. Crouch claimed that she indeed wanted him to actively share parenting with her. Only after further assurances about this from Ms. Crouch, did Kevin McIntyre, in December 1985, agree to have a child with Ms. Crouch.

Ms. Crouch stated that it was important to her that her child have a father who would be active in its life and that was why she had chosen Mr. McIntyre to father her child. Over the next several weeks they continued to discuss their parenting. They discussed and agreed on issues including amniocentesis during pregnancy, the child's religion, baptism, schooling in public schools, discipline. They

specifically discussed how important it would be for the child to have Mr. McIntyre's male influence in its life and to be able to share the broadening experiences of travel which Mr. McIntyre could provide.

The parties agreed that they would share specific events in the child's life such as the determination of pregnancy, recognition of fetal heartbeat, estimated date of delivery, the delivery of the child, participation in choosing the child's name, seeing the child take its first steps and hearing the child's first words. They agreed that Mr. McIntyre would have visitation with their child one weekend each month and for six consecutive weeks each summer.

After all these things were discussed and agreed upon, the parties agreed to and did get together on February 16, 1986, in Oregon to attempt

conception. In reliance on his agreement with Ms. Crouch, Kevin McIntyre placed his semen in a jar from which Ms. Crouch then inseminated herself. There was no doctor, sperm bank or health professional involved in the insemination.

In March, Ms. Crouch informed Mr. McIntyre that she was pregnant with his child. Later, when the child's sex was determined, she sent him a banner printed with "It's a girl!" The parties met again in Oregon in May prior to Mr. McIntyre leaving a a trip to Europe. They talked of some day traveling together with their daughter in Europe.

The parties again met in August, 1986 and attempted, without success, to agree on a name for their daughter. Ms. Crouch told Mr. McIntyre that he should obtain a bassinet, car seat, clothing and diapers for their daughter's use when she was with him in California. Mr.

McIntyre's mother gave him a changing table and clothes for his daughter's use. She also sent other items for her future granddaughter to Ms. Crouch. At least through August, 1986, Ms. Crouch told friends that Mr. McIntyre was to have frequent visitation with their daughter including alternating holidays, birthdays and vacations.

After August, Ms. Crouch's attitude toward Mr. McIntyre's parenting soured. Ms. Crouch gave birth to the parties' daughter on November 24, 1986. Mr. McIntyre learned of his daughter's birth from Ms. Crouch's parents. Since his daughter's birth, Mr. McIntyre has been denied any contact with her.

Kevin McIntyre filed his filiation petition in February 1987.

REASONS FOR DENYING CERTIORARI

I. <u>The State Court's Judgment Is Not Final</u>.

The Oregon Court of Appeals reverrsed the trial court's grant of summary judgment and remanded for trıal. As a general rule, a state court's judgment that contemplates further proceedings, as this judgment does, is not final for the purposes of 28 U.S.C. section 1257(3) (1982). See Cox Broadcasting v. Cohn, 420 U.S. 469, 479-85 (1975). Nor does this case appear to fall within any of the exceptions to the rule idenitified in Cox Broadcasting.

This is not a case in which the outcome of further state proceedings is preordained. Cox Broadcastin v. Cohn, supra, 420 U.S. at 480. The trial court has yet to determine the factual issues of whether there was agreement between the parties as to Mr. McIntyre's parental rights, whether there was reliance on that agreement, as well as what parental

rights and responsibilities, if any, Mr. McIntyre has to his daughter.

This is not a case in which the federal due process issue will remain regardless of the outcome of the trial on remand. See Id. at 479. If at trial Respondent is unable to prove the agreement, he will have had his due process and could not appeal that issue, while Petitioner would have no cause to appeal the due process determination.

This is not a case where the federal issue will necessarily be mooted on remand. Id. at 481. If the trial court finds that the agreement or reliance is less than what the Respondent had alleged, doubt may exist as to whether the Oregon Court of Appeals' test has been met, thus occasioning further appeal on the due process issue.

Finally, this is not a case in which the failure to grant review immediately

would seriously erode federal policy. See Id. at 482-83.

Rather, this case is more like Minnick v. California Dept. of Corrections, 452 U.S. 105 (1981). There, this Court found that the substantial questions of fact remaining even after an initial trial, required that remand to the trial court proceed before this Court would entertain review.

II. There Is No Conflict with Other States or Circuits. Petitioner has cited no decision of any state or circuit which is in conflict with the Oregon Court of Appeals decision in this case. Respondent is aware of only three cases at all similar to the case at bar. In each case, the Court ruled that the father was entitled to a hearing to establish his parental rights. In no case did the court have to reach the question of whether a state could

constitutionally eliminate a donor's parental rights to his child created by artificial insemination. In those cases involving a statute which purported to limit the rights of the donor, the courts construed the statute to be inapplicable.

In the case most similar to the case at bar, In Interest of R.C., 775 P.2d 27 (Colo. 1989), the Colorado Supreme Court held that that state's artificial insemination statute did not apply to known semen donors and unmarried recipients who agree that the donor will be treated as the child's father. The Court noted that a number of commentators have concluded that the intent of the known donor and the unmarried recipient is relevant to a determination of parental rights.[2] The court also

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[2] See Andrews, Legal Aspects of New

reviewed the two cases cited below and

Reproductive Technologies, 29 Clinical Obstetrics & Gynecology 190, 200 (1986) (as artificial insemination laws evolve, they "should take the approach of allowing the parties' preconception intent to govern paternity"); Kern & Ridolfi, The Fourteenth Amendment's Protection of a Woman's Right To Be a Single Parent through Artificial Insemination by Donor, 7 Women's Rts. L. Rep. 251, 256 (1982) (if custody suit between unmarried recipient and known donor were to arise, "the court may view the expectations (or intent) of the parties as relevant"); Vetri, Reproductive Technologies and United States Law, 37 Int'l & Comp.L.Q. 505,514 (1988) ("We use the intent of the parties when the woman is married in determining parental responsibilities, and should do so in the rare cases when the woman is unmarried."); Note, Artificial Insemination: Donor Rights in Situations Involving Unmarried Recipients, 26 J.Fam.L. 793, 806 (1988) (in situations where a known donor is involved with an unmarried recipient, a court will consider the familial expectations" of the donor "with the intention of the donor toward the resulting child at the time of insemination being a key factor"); Andrews, Legal Aspects of Assisted Reproduction, 54 Annals N.Y.Acad.Sci. 668, 674 (1988) (in thirty states by statute and in many other countries, "the preconception intent of the parties [in artificial insemination

concluded, "the result is inescapable that intent of the parties was a relevant consideration in determining whether the known donor's parental rights were extinguished." Id. at 34. Accordingly, the Court held,

> Where ... the unmarried recipient and the known donor at the time of insemination agree that the the donor will be the natural father and act accordingly based on an express understanding that he will be treated as the father of any child so conceived, we concur with the commentators, as well as the Jhordan C. and C.M. courts, that agreement and subsequent conduct are relevant to preserving the donor's parental rights despite the existence of the statute. Id. at 35.

Jhordan C. v. Mary K., 224 Cal.Rptr. 530, 179 Cal. App. 3rd 386 (1986), also involved a known donor of semen to an unmarried woman. The California court construed that state's artificial

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cases] governs who are the legal parents after the child is born").

insemination statute to not apply to inseminations which did not involve a physician. Hence, the court held that the donor-father was not precluded from pursuing a paternity action and was entitled to visitation rights to his child.

In C.M. v. C.C., 152 N.J. Super. 160, 377 A.2d 821 (1977), the New Jersey Court held that a father is no less so because his child is created by artificial insemination of his sperm rather than by intercourse. New Jersey had no artificial insemination statute in effect at the time. The parents had known each other for some time and were contemplating marriage. There had been no agreement about parental rights. The court found particularly significant the facts that the child had "no one else who was in a position to assume the responsibilities of fatherhood when the

child was conceived" and that the donor "fully intended to assume the responsibilities of parenthood" at the time of insemination. Id. at 165-67, 377 A.2d at 824.

III. The Case Was Correctly Decided and Is Consistent with this Court's Prior Decisions.

The Oregon Court of Appeals correctly held that Respondent has a liberty interest deserving of constitutional protection under the Fourteenth Amendment. The parent-child relationship has been acknowledged to be a liberty interest subject to constitutional protection since Meyer v. Nebraska, 262 US 390, 399, 67 L Ed 1042, 43 S Ct 625, 29 ALR 1446 (1923). Its protection has continued over the years in such decisions as Skinner v. Oklahoma, 316 US 535, 541, 86 L Ed 1655, 62 S Ct 1110 (1942), and Prince v. Massachusetts,

321 US 158, 166, 88 L Ed 645, 64 S Ct 438 (1944). An unwed father was found to have a liberty interest in his relationship to his children in Stanley v. Illinois, 405 US 645, 31 L Ed 2d 551, 92 S Ct 1208 (1972), where this Court held that to automatically remove custody from an unwed father upon the death of the mother, without notice and a hearing on fitness, created an unconstitutional presumption that all unwed fathers are unfit parents.

While Stanley, supra., considered the father's rights versus the rights of the state, each of this Court's subsequent cases dealing with an unwed father's rights has involved the additional and competing claim of the husband of the child's mother. (In contrast, the Petitioner here is unmarried and there is no father figure available to the child other than the Respondent).

In cases where the mother has married subsequent to the child's birth, this Court has found that the protection afforded the unwed father's rights versus the husband's rights to his stepchild depends upon whether the natural father has demonstrated a substantial relationship to, or paternal interest in, his child and has acted with reasonable promptness in asserting his rights to the child.

In Quilloin v. Walcott, 434 US 246, 54 L Ed 2d 511, 98 S Ct 549 (1978), this Court found that the state of Georgia had provided the unwed father due process and that step-parent adoption by the mother's husband was in the best interests of the child where the natural father had been "afforded a full hearing on his legitimation petition, at which he was given the opportunity to offer evidence on any matter he thought relevant,

including his fitness as a parent." 434 US 246 at 253, 54 L Ed 2d 511 at 519. The Court noted that the natural father had not sought to legitimate the child until after the step-father had petitioned to adopt the then eleven year old child. This Court appeared to be particularly impressed with the fact that while Quilloin had never sought either physical or legal custody, the mother's husband had been living with the child and serving as its step-parent for the last nine plus years.

In Caban v. Mohammed, 441 US 380, 60 L Ed 2d 297, 99 S Ct 1760 (1979), this Court held that New York's disparate treatment of unwed mothers and unwed fathers, requiring the mother's consent while not requiring the natural father's consent to his child's adoption by the mother's husband and not allowing the natural father to demonstrate his own

fitness as a parent, violated Fourteenth Amendment equal protection. The procedural due process issue was not reached.

Lehr v. Robertson, 463 US 248, 77 L Ed 2d 614, 103 S Ct 2985 (1983), involved the competing claims of a stepfather who had been married to the child's mother for one and one-half years and the natural father who, although he had lived with the mother up until the child's birth, had had almost no contact with the child since then and had never sought legal rights to the child until after the step-parent adoption petition was filed. This Court found that New York's statutes providing advance notice of adoption proceedings to persons who list their names on a putative father registry satisfied due process where the natural father had never listed himself with the registry and never sought legal rights to

the child until after she was two years old. The Court stated that when an unwed father demonstrates a full commitment to the responsibilities of parenthood by "coming forward to participate in the rearing of his child" Caban, 441 US, at 392, n. 7, 99 S Ct, at 1766, n. 7, his interest in personal contact with his child acquires substantial protection under the Due Process Clause. At that point it may be said that he "acts as a father toward his children." Id., at 389, n. 7, 99 S Ct, at 1766, n. 7.

Essentially, this Court found that New York had adequately protected Mr. Lehr's opportunity to form such a protected relationship with his child but that Mr. Lehr had not taken advantage of that opportunity.

In contrast, the Oregon Court of Appeals in McIntyre correctly found that Kevin McIntyre had "grasped the

opportunity" to "participate in the rearing of his child" as indeed he has done everything he could do to be involved with the rearing of the child. Even before the child's birth, Mr. McIntyre exercised his parental rights when he discussed and reached agreement with Ms. Crouch on various aspects of how the child was to be reared, including such matters as religion, education and discipline. This Court has found such parental decisions themselves to be liberty interests subject to constitutional protection in Meyer v. Nebraska, supra. and Pierce v. Society of Sisters, 268 US 510, 45 S Ct 571, 69 L Ed 1070 (1925). When Ms. Crouch then denied Mr. McIntyre contact with his child after her birth, Mr. McIntyre promptly filed this paternity suit to obtain visitation. By so doing, he has taken advantage of the only procedure the state has to

enable him to develop his relationship with his daughter.

Yet Ms. Crouch now argues that because Mr. McIntyre has not done more--such as live with the child for a period of years as had the father in Stanley, supra. -- Mr. McIntyre now should have no liberty interest or other rights to his child. Ms. Crouch ignores the fact that it is only because she has refused Mr. McIntyre further contact with his child that he has not further developed his relationship with his daughter.

In essence, Ms. Crouch's argument is that because she has prevented Mr. McIntyre from visiting his daughter, he is not entitled to a hearing on his legal rights to visitation. Such "might makes right" conduct does not square with the Due Process Clause of the Fourteenth Amendment.

Petitioner argues that the Oregon Court of Appeals has misread Lehr v. Robertson, 463 US 248, 77 L Ed 2d 614, 103 S Ct 2985 (1983) and implies that Mr. Lehr had a more substantial relationship than that involved in McIntyre and that Lehr lost because he had not had a more lengthy relationship with the child. In fact, this Court's decision not to upset the court-ordered step-parent adoption was based on a finding that Lehr had failed to record his name and address with the putative father registry, and that it was because of his failure to do so that he did not enjoy the due process notice and hearing which were available to him. It appeared important to this Court that Lehr had waited for more than two years after the child's birth to file his paternity petition. In summary, Lehr involved a competing stepfather who had legally adopted the child, a delay of

over two years in the biological father's filing of his paternity petition and a failure to utilize the procedures available to provide him with notice and opportunity to be heard. In contrast, Kevin McIntyre is the only available father for his child, no other court proceedings have occurred regarding the child, the mother has never married anyone and Mr. McIntyre promptly filed his paternity petition within sixty days of his daughter's birth.

Petitioner also argues that this Court's recent decision in Michael H. v. Gerald D, 491 US __, 109 S Ct 2333, 105 L Ed 2d 91, 51 LW 4691 (1989) would require that Respondent be found to have no liberty interest entitled to Fourteenth Amendment protection.[3] Petitioner

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[3]It must be noted that the plurality

acknowledged, at footnote 1 of her petition for review by the Oregon Supreme Court, that the decision is "fact based". Indeed, the peculiar and "extraordinary" fact that the child was born to a married woman living with her non-impotent husband dictated the decision in that case. The California Court of Appeals below had held it "a matter of overriding

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opinion's method of analysing a liberty interest was the opinion of Justices Scalia and Rhenquist only. The other justices specifically did not agree with the analysis employed in the plurality opinion. As Justice Brennan's dissenting opinion points out, four justices agreed that the natural father there had a liberty interest and a fifth justice assumed such a liberty interest for the purpose of the case. Further, Justice Brennan notes, five justices of the Court agreed "that the flaw inhering in a conclusive presumption that terminates a constitutionally protected interest without any hearing whatsoever is a procedural one." 105 L.Ed.2d at 114. (emphasis supplied).

social policy" that the mother's husband would be deemed the child's father. So too, a plurality of this Court held "Where, however, the child is born into an extant marital family, the natural father's unique opportunity conflicts with the similarly unique opportunity of the husband of the marriage; and it is not unconstitutional for the State to give categorical preference to the latter."[4] 105 L Ed 2d at 109. It would appear that the precedential value Michael H. v. Gerald D., supra, is limited to children conceived and born to women while they were living with their non-impotent husbands.

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[4]Still, Justice Brennan notes that "Five Members of the Court refuse to foreclose 'the possibility that a natural father might ever have a constitutionally protected interest in his relationship with a child whose mother was married to and cohabiting with another man at the

In summary, each of this Court's decisions relating to unwed fathers since Stanley, supra, have involved a mother's husband's claim of paternal rights in competition with the natural father's claim. With the sole exception of Michael H. v Gerald D., supra, which involved a child born into an extant marriage, in each case where the natural father has demonstrated a significant paternal interest and has acted promptly to develop and protect that interest, the natural father has been successful in preserving his parental rights. Where the natural father has failed to exercise and act quickly to protect his rights he has lost those rights to the mother's husband who had developed a defacto

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time of the child's conception and birth.'" 105 L.Ed.2d at 114.

parent-child relationship and who had legally formalized the relationship. None of this Court's decisions is in conflict with the Oregon Court of Appeals decision in McIntyre.

IV. This Case Is Unlikely to Recur.

As the above recitation of facts should make clear, this is a fairly unique case which is not likely to occur again. The Court of Appeals decision is narrowly tailored to the facts of this particular case and is dependent upon Mr. McIntyre proving on remand that the parties specifically agreed to share parenting rights and responsibilities to the child they were about to create by artificial insemination and that the insemination was in reliance on that agreement. The decision will affect few other parent child relationships.

The decision will have no affect on

anonymous donor inseminations which comprise the great bulk of inseminations.[5] Neither will the decision affect non-anonymous inseminations where there was no preinsemination agreement that the father would have parental rights. The Oregon Court of Appeals decision simply allows Kevin McIntyre to establish and enforce his agreement with Ms. Crouch. The

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[5]While it has been estimated that there may be as many as 20,000 women artificially inseminated annually in the United States (note, Reproductive Technology and the Procreation Rights of the Unmarried (1985) 98 Harv.L.Rev. 669, fn.1.), only some 1500 of these women are unmarried. (Donovan, The Uniform Parentage Act and Nonmarital Motherhood-by-Choice (1982-83) 11 N.Y.U.Rev. of Law & Soc. Change 193, 195.) Presumably, the great majority of these are anonymous inseminations involving doctors and sperm banks. And only some, presumably small, percentage of these nonanonymous inseminations involve any agreement that the donor is to retain parental rights to the offspring.

decision will not adversely affect other parent child relationships.

V. Or.Rev.Stat. 109.119 Does Not Provide Respondent Due Process.

Petitioner argues that due process is afforded Respondent by Or.Rev.Stat. 109.119. This statute is designed to provide protections to "a foster parent, stepparent, grandparent" or other relative who lived with the child. Reading the full statute it is clear that it is not relevant to this case. Or.Rev.Stat. 109.119(4) clarifies that the "child-parent relationship" which the statute concerns applies only to persons who have had physical custody of or resided with the child.[6] In addition, it

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[6]Or.Rev.Stat. 109.119 (4) provides: "As used in this section 'child-parent relationship' means a relationship that exists or did exist, in whole or in part, within the six months preceding the

should be noted that the Petitioner failed to raise Or.Rev.Stat. 109.119 either at trial or on appeal. It was first raised on her Petition for Review to the Oregon Supreme Court. That Court denied its discretionary review.

As Or.Rev.Stat. 109.119 does not apply to Respondent, it could not be construed to provide him with Due Process.

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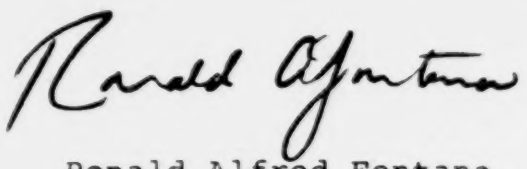
filing of an action under this section, and in which relationship a person having custody of a child or residing in the same household as the child supplied, or otherwise made available to the child, food, clothing, shelter and incidental necessaries and provided the child with necessary care, education and discipline, and which relationship continued on a day-to-day basis, through interaction, companionship, interplay and mutuality, that fulfilled the child's psychological needs for a parent as well as the child's physical needs. However, a relationship between a child and a person who is the foster parent of the child is not a child-parent relationship under this section unless the relationship continued over a period exceeding three years."

CONCLUSION

The Oregon Court of Appeals correctly decided McIntyre v. Crouch, Supra. The decision is consistent with the reported decisions of other states and of this Court. The Court of Appeals decision turns on and is narrowly tailored to the particular facts involved and will affect few other litigants. Further, the state court decision is not final and this Court lacks jurisdiction.

In short, there is no reason for the Supreme Court of the United States to review this case.

March 29, 1990 Respectfully submitted,



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